

MESINIAGA SDN BHD

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v.

UNION INSURANCE MALAYSIA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL KADIR SULAIMAN J

[CIVIL APPEAL NO: R1-12-411-93]

3 JANUARY 1997

INSURANCE: Agents - Whether broker agent of Insured or Insurer - General rule - Whether premium must be paid before policy is issued - Insurance Act 1963, s. 14A(3)

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CIVIL PROCEDURE: Pleadings - Defence - Failure to plead defence - Whether court must reject defence

The respondent insurer brought a claim against the appellant insured for monies owing to it in unpaid premiums, in connection with insurance policies taken up by the appellant from the respondent through the appellant's agents, Segera. The appellant denied that they owed the respondent any such monies and that Segera was its agent. It claimed that all sums due to the respondent by way of insurance premiums had been settled by direct payment to the respondent and by payment to Segera alleged to be the agent for the respondent. Further the appellant argued that if any amount was due to the respondent, it was only in respect of 'net premium' and not the gross amount. In the alternative, the appellant averred that the insurance contracts entered into between the parties were void and unenforceable, as they were made in contravention of the Insurance Act 1963 ('the Act'), in that the policies were issued before the receipt of the insurance premiums by the respondent. The appellant therefore counterclaimed for the return of the insurance premiums paid.

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The Sessions Court judge ruled that the insurance contract was valid and enforceable because the policies involved related to insurance other than motor insurance. It followed therefore that the counterclaim by the appellant must necessarily fail. In considering the relationship of Segera to the parties, she held that Segera was the appellant's insurance broker and was acting on behalf of the appellant. The learned judge held that the argument that the respondent was only entitled to the 'net premium' and not the gross premium as being a matter outside the pleadings. The appellant appealed.

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a Held:

[1] It was correctly held by the Sessions Court judge that the argument, that any premium if due to the respondent was only in respect of the net amount, ought to be rejected because it was not pleaded in the defence. It is trite law that parties must confine themselves to the pleadings.

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[2] In the context of the Act, any commission paid by the respondent to Segera was compensation paid to an independent contractor who had acted on behalf of the appellant in the procurement of insurance with the respondent. The right of Segera over the commission from the respondent, if any, was a distinct right as between him and the respondent having nothing to do with the appellant in relation to the insurance contract.

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[3] It is an exception rather than the rule that a broker is an agent for the insurer.

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[4] Section 14A(1) is not applicable to general insurance business. Section 14A applies only to motor vehicle insurance business. In the circumstances, the transaction did not contravene s. 14A of the Act and the judge in the lower court was right in holding that the insurance contract involving the appellant and the respondent was valid.

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[Appeal dismissed.]

Cases referred to:

Chua Yew Phong v. A.S Yeo; Edward Lumley & Sons (M) Ltd – 3rd Party [1966] 2 MLJ 257 (**refd**)

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Minett & Anor, Assignees of Barchard, a Bankrupt v. Forrester [1811] 4 TAUNT 441 (**dist**)

National Employers' Mutual General Insurance Association Ltd v. Globe Trawlers Pte Ltd [1989] 1 CLJ 831 (**refd**)

Pacific and Orient Underwriters (M) Sdn Bhd v. Choo Lye Hock [1977] 1 MLJ 131 (**dist**)

g**Legislation referred to:**

Insurance Act 1963, ss. 1A, 14A(1)(a), (b), (3), 45

For the appellant - Christie Soosay Nathan; M/s Christie Soosay Nathan & Assoc

For the respondent - Vinayaga Raj Rajaratnam; M/s Skrine & Co

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Reported by Anne Khoo

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JUDGMENT

Abdul Kadir Sulaiman J:

This is an appeal by the defendant in the court below against the decision of the learned sessions court judge ordering it to pay to the respondent/plaintiff the claim of the plaintiff for certain sums of money with interests at 8% p.a. from 11 October 1988 to the date of final payment, and dismissing its counterclaim against the respondent.

In this case, the respondent is an insurance company – an insurer, whereas the appellant is an insured. Between them is an insurance broker – Segera Insurance Brokers Sdn. Bhd., (hereinafter referred to as “Segera”) who is not a party to the action.

According to the statement of claim, the claim by the respondent is for balance due in respect of insurance premium due and owing to it from the appellant amounting to RM11,902.70 in connection with insurance policies taken up by the appellant from the respondent through the appellant’s agents, Segera. The appellant in its statement of defence denied the claim of the respondent including that of Segera being its agents. All sums due to the respondent by way of insurance premiums had been settled by way of direct payment made to the respondent and by payment made to Segera being the agent for the respondent. In the alternative, the appellant avers that the insurance contract entered into between the parties are void and unenforceable, it being made in contravention of Insurance Act 1963, (hereinafter referred to as ‘the Act’) in that the policies were issued before the receipt of the insurance premium by the respondent. The appellant counterclaims against the respondent for a sum of RM30,026.82 being insurance premiums paid pursuant to the alleged illegal contract. In its statement of reply, the respondent denies the counterclaim of the appellant as well as to the fact that Segera was its agent because by a letter dated 6 November 1985, Segera was appointed by the appellant as its agent. However, this letter was held inadmissible as evidence by the learned judge because the author was not called as a witness in the trial.

The learned judge in her grounds of judgment commencing from p. 60 of the record, ruled that the insurance contract entered into between the appellant and the respondent was valid and enforceable because the policies involved relate to insurance other than motor insurance as prescribed by P.U.(A) 248/1980 for purposes of s. 14A of the Act. Having so decided, she held that the counterclaim by the appellant must necessarily fail and therefore, the only issues then for her to consider was the relationship of Segera to the parties and the amount of the claim. She found in the evidence of SD1 for the appellant that Segera was the appellant’s insurance broker who had been acting

- a* on behalf of the appellant. Added to that is exh. "D50", the account statement of the appellant, which supports the conclusion that Segera is in fact the agent for the appellant. Segera acted on the directions of the appellant as regard the nature of insurance policies to be taken with the respondent. She found as a fact that all insurance premiums due from the appellant were paid by it
- b* to Segera except for one single premium when the appellant paid it direct to the respondent.

- c* In the course of the trial in the court below an issue was brought out by the appellant that if any amount ever due to the respondent it was only in respect of "net premium and not the gross. The learned judge in the court below rejected it as being matters outside the pleadings as the defence of the appellant revolves round the allegation that the insurance contract was void and illegal and that it had fully settled all the premiums due.

- d* Before me at the hearing of this appeal the learned counsel for the appellant repeats the contention that any amount of premium if due to the respondent from the appellant it is only in respect of the net amount after taking into consideration of the discount given by the respondent to Segera. I reject this line of submission because as was correctly held by the learned judge in the court below that this issue is not pleaded in the defence of the appellant. It is trite law that parties must confine themselves to the pleadings. In the defence
- e* against the claim by the respondent of RM11,902.70 no mention was made regarding this net premium payable, if any due, to the respondent. Instead it pleaded that full and final settlement of all insurance premiums due to the respondent has been effected. But the learned counsel for the appellant submitted that it was so pleaded in the defence by para. 5 which states:

- f* 5. The defendant further states that the plaintiff's present claim is erroneous, misconceived and bad in law and that as a result thereof the Defendant is not liable in law or in fact to accede to the demands of the Plaintiff.

- g* Sad to say that I cannot see in the paragraph pleaded of the suggestion or anything that could be implied as raising the issue of net premium. If that be the intention of the appellant the pleadings does not condescend to particulars. The learned counsel in his submissions submitted that if respondent were not clear with the pleadings it could have asked for further and better particulars
- h* which was never done. But, in the light of the defence put up including para. 5 it is not reasonable to fault the respondent for having failed to act in the way the appellant wanted. In the circumstances, the learned judge was correct that this issue of net premium should not be allowed to be raised by the appellant in the trial.

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On the agency issue, the learned counsel for the appellant in his submissions before me agrees that Segera is the broker and agent for the appellant as a general rule. But in connection with the collection of premiums Segera also acted as agent for the respondent being its collecting agent. In support he cited a passage by Mansfield CJ in *Minett and Another, Assignees of Barchard, a Bankrupt v. Forrester* [1811] 4 TAUNT 441 where at p. 442 the learned judge said:

The broker is agent for the assured, and also for the underwriter; he is agent for the insured, first, in effecting the policy, and in everything that is to be done in consequence of it; then he is agent for the underwriter as to the premiums, but for nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter; **but the whole account with respect to the premium, after the insurance is effected, remains clear and distinct account between the underwriter and broker.** (emphasis added).

I find that this line of submissions lacks any merit because even upon the case cited, it is clear that the broker is the agent for the insured. The broker is “the agent” for the insurer only as to the premium. But in the light of the definition of the term “broker” in s. 1A of the Act, the *dicta* by Mansfield CJ concerning the position of the broker being the agent for the insurer as to the premium must be looked at in the context of our own Act. Section 1A defines a broker thus:

broker means any individual, firm or company who for compensation as an **independent contractor**, in any manner solicits, negotiates or procures insurance or the renewal or continuance thereof **on behalf of the insured** other than him (emphasis added).

Therefore any commission paid by the respondent to Segera is the compensation paid to an independent contractor who acts on behalf of the appellant in the procurement of the insurance with the respondent. The right of Segera over the commission or compensation from the respondent, if any, is a distinct right as between it and the respondent having nothing to do with the appellant in relation to the insurance contract. On the contract of insurance between the appellant and the respondent, upon the risk undertaken by the respondent the appellant is required to pay certain premiums. The obligation therefore, is that of the appellant to meet the premium levied. In the insurance business, there is in existence a broker who will undertake by the nature of his profession to collect the amount of premium due from the insured and to pay it to the insurer on behalf of the insured. For his services, the practice is that the insurer would pay the broker his commissions.

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- a* In the circumstances, merely for the broker having been paid his commission by the insured for the services rendered, the broker cannot in law be construed to be the agent of the insurer. The broker remains the agent for the insured which is the appellant in this case for the procurement of the insurance on its behalf. Therefore, the learned judge below was right in coming to the conclusion that Segera is the agent for the appellant who is the insured. In *Chua Yew Phong v. A.S. Yeo; Edward Lumley & Sons (M) Ltd. – 3rd Party* [1966] 2 MLJ 257 MacIntyre J expressed the same view that insurance brokers are agents for the insured when at p. 258 he said:

- c* The business of insurance brokers is to act as intermediaries between the insurance companies and the prospective policy holders. In effecting these contracts, the insurance brokers constitute themselves as agents of the policy holders and in that capacity may sue the underwriters on behalf of their clients to enforce a contract of indemnity.

- d* A similar stand was taken by Chao Hick Tin J in *National Employers' Mutual General Insurance Association Ltd. v. Globe Trawlers Pte. Ltd.* [1991] 2 MLJ 92 in coming to the conclusion that an insurance broker is not acting as an agent for the insurer but for the insured. The case involves material description contained in the proposal form completed by the broker on behalf of the insured. At p. 95 the learned judge said:

- e* The general rule is that a broker who completes the proposal form is not acting as an agent for the insurer but for the insured. This is laid down in the leading case *Newsholme Bros. v. Road Transport & General Insurance Co. Ltd.* [1929] 2 KB 356.

- f* Further down at p. 96 the learned judge said:

- g* The courts have departed from the general rule only where there have been some unusual circumstances in the case, eg the insured was blind or illiterate. *Bowden v. London, Edinburgh & Glasgow Assurance Co.* [1892] 2 QB 534 was effectively concerned with an illiterate insured. To the extent that Bowden's case sought to lay down any general rule, Scrutton LJ in *Newsholme* seriously doubted its validity.

- On the opposite side is the decision of Abdul Hamid J (as he then was) in *Pacific and Orient Underwriters (M) Sdn. Bhd. v. Choo Lye Hock* [1977] 1 MLJ 131 which concerns the application by the plaintiff insurer for a declaration that a policy of insurance issued by the insurer was *void ab initio* on the ground of material misdescription in the proposal form on behalf of the proposed insured who only spoke in Chinese. The said form was in English filled in by the issuing agent. The learned judge dismissed the application holding that the agent who filled in the form was not the agent of the proposed insured but that of the insurer. At p. 132 the learned judge said:
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I am conscious of the fact that there is a declaration to the effect that if such answers are in the writing of any other person such person shall be deemed to have been an agent of the respondent (the proposed insured) for the purpose of filling in the form, nonetheless, I form the view that the agent was not the agent of the respondent but that of the applicants (the insurer). To my mind the declaration only raises a rebuttable presumption. It may be rebutted by extraneous evidence and the onus lies upon the respondent. In the instant case it is abundantly clear from the affidavit evidence and in the light of the documents before this court that Eddy Chew, the agent named in the proposal form, was acting for and on behalf of the applicants. The fact that Eddy Chew's name appears at the top of the proposal form against the word 'Agency' provides clear proof that he was the agent of the applicants and not of the respondent. In consideration it is my judgment that on the materials before me and for reasons that I have stated this application cannot succeed and I would proceed to declare that the said policy of insurance is a valid policy and the applicants are disentitled to avoid the same

However, this case cited can easily be distinguished on its own facts owing to the presence of unusual circumstance as in the example given by the learned judge in *National Employers' Mutual General Insurance Association Ltd. v. Globe Trawlers Pte. Ltd.*, *supra*. It is an exception rather than the rule that the broker is an agent for the insurer. On the fact of the instant case, there does not appear to be any unusual circumstance.

The circumstance appear to be a general one to be found in the insurance business where a broker receives commissions from the insurer for services rendered in getting the premiums from the insured to the insurer. The mere fact that some of them are referred to as insurance agents or being recorded as such in the book of the insurance company does not change the position in law that they are the agents for the insured. Therefore the learned judge in the court below has not erred in arriving at the conclusion.

Next, on the issue of the illegality of the insurance contract entered into between the appellant and the respondent. It is submitted on behalf of the appellant that it is illegal because it contravened s. 14A of the Act in that at the time of the issue of the insurance policies the premium had not been paid by the appellant. Section 14A states:

- 14A. (1) Subject to subsections (2) and (3), no insurer shall assume any risk in respect of any general insurance business unless and until –
- (a) the premium payable is received by the insurer or is guaranteed to be paid by such person in such manner and within such time as may be prescribed; or
 - (b) deposit of such amount as may be prescribed is made in advance in the manner prescribed.

- a* (2) Where the premium payable pursuant subsection (1) is received by any person, including an insurance agent or a broker, on behalf of an insurer, such receipt shall be deemed to be the receipt by the insurer for the purposes of that subsection and the onus of proving that the premium payable was received by a person, including an insurance agent or broker, who was not authorised to receive such premium shall lie on the insurer.
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- (3) Subsections (1) and (2) shall apply to such description of general insurance business as may from time to time be prescribed.
- c* (4) Where any person, including an insurance agent or a broker, receives on behalf of an insurer a premium on a policy of insurance of a description for the time being prescribed pursuant to subsection (3), such person shall deposit with, or despatch by post to, the insurer the premium so collected within such period as may be prescribed in relation to policies of that description.
- d* (5) Any refund of premium in relation to a policy of insurance of a description as may be prescribed under subsection (3) which may become due to the insured on account of the cancellation of the policy or the alteration in its terms and conditions or for any other reason shall be paid by the insurer directly to the insured and a proper receipt shall be obtained by the insurer from the insured and such refund shall under no circumstances be paid or credited to any other person, including an insurance agent or a broker.
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- (6) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit.

f Section 14A(1) is not applicable to general insurance business generally. By sub-s. (3) it applies only to certain description of general insurance business which has been prescribed. Under s. 45 thereof, the Minister is given the power to prescribe the description of general insurance business to be subject to the provisions of s. 14A(1)(a) or (b). By P.U.(A) 248 dated 28 August 1980 in the exercise of the powers conferred by s. 45 of the Act for the purpose of s. 14A the Minister made a regulation known as the Insurance (Assumption of Risk and Collection of Premiums) Regulations 1980 which came into force on 1 November 1980 which apply only to motor vehicle insurance business.

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h It is not in dispute that the matter of insurance involved in the instant case is not one of a motor vehicle insurance. In the circumstances, the transaction involved does not contravene s. 14A of the Act as so contended by the appellant. So, the learned judge below was right in so holding that the insurance contract involving the appellant and the respondent is valid.

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At the stage of his final reply to the submissions made by the learned counsel for the respondent, the counsel for the appellant withdrew the appeal against the decision of the learned sessions judge dismissing the counterclaim and prayed for no order as to costs of its appeal as the issue really is on the interpretation of s. 14A of the Act on the question of illegality of the insurance contract between the appellant and the respondent. Having done a detailed study and research over the matter, he came to realise that based on s. 14A the dismissal of the appellant's counterclaim by the court below would not justify an appeal against the said decision, hence the oral application for withdrawal. However, there was no similar application at all being made on the appeal in regard to the decision of the court that the contract was not void or illegal as alleged on the strength of s. 14A of the Act. Of course, the learned counsel for the respondent objected strenuously on the issue of costs. The award of costs is within the discretionary power of the court. However, in the circumstances of this case, the costs should follow the event.

In the final analysis, I find that there is no merit at all to this appeal by the appellant in the light of the reasons stated above. I therefore, dismiss this appeal of the appellant with costs to the respondent, to be taxed, unless agreed.

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